IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2884 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DILIP DHARMRAJ VIRAGI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2884 of 2004

MRS. S G Patel for Mr UTPAL M PANCHAL for Petitioner No. 1

Ms Mita Panchal, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 17/04/2004

ORAL JUDGMENT

The petitioner has filed this petition under under Article 226 of the Constitution of India for

appropriate writ, order or direction for quashing and setting aside an order dated 7.11.2003 passed by respondent No.2 under section 3(2) of the Gujarat Prevention of Anti-social Activities At, 1985 (for short, 'the PASA Act') directing detention of the present petitioner on the grounds stated in the detention order.

2. It was alleged that one case was registered with Vapi Prohibition Station being C.R. No.750/2003 dated 17.9.2003 against the petitioner. It was also alleged against the petitioner that two witnesses had rendered statements against the petitioner and, their names were not disclosed to the petitioner. On the strength of the aforesaid registered offence and unregistered cases, the petitioner was ordered to be detained by the aforesaid order.

3. On receiving the petition, rule was issued and in response to the notice of rule, Ms. Mita Panchal, learned AGP appears for the respondents. I have heard the learned Advocates for the parties and have perused the papers.

4. At the stage of final hearing, learned Advocate for the petitioner has argued that a solitary offence was registered against the petitioner saying that the petitioner was involved in a prohibition offence in respect of the offences punishable under sections 65 and 66 of the Bombay Prohibition Act, 1949. She has contended that simply because a solitary offence under the Bombay Prohibition Act has been registered against the petitioner, it cannot be said that the petitioner's activities are such that they would lead to a threat to public order and public health.

5. It can be gathered that a solitary offence as mentioned has been registered against the petitioner and simply because a single offence has been registered against the petitioner under the Bombay Prohibition Act, it would be difficult to accept that the activity of the petitioner was such that it would lead to a threat to public order or public health. Therefore, the order of detention cannot be sustained on this ground.

6. The detaining authority has considered statements of two witnesses whose names have not been disclosed. Learned Advocate for the petitioner has argued that since names of the witnesses were not disclosed to the petitioner, the petitioner could not submit effective representation against his detention.

7. At this stage, learned AGP has contended that under section 9(2) of the Act, the detaining authority was empowered to keep names of the witnesses away from the notice and knowledge of the petitioner. It is true that the detaining authority possesses power of privilege under section 9(2) of the ACt. However, it is well settled that while claiming power under section 9(2) of the Act, the detaining authority has to examined and verify the correctness and genuineness of the statements made by the witnesses particularly with respect to apprehension or fear demonstrated by them in their statements. In the present case, we find that no material has been produced on record to show that such verification was undertaken and there was material with the detaining authority to come to a finding that the witnesses had a reasonable fear or apprehension in their minds and, therefore their names could not be disclosed to the petitioner. In absence of any such material with the detaining authority, it cannot be said that the power of privilege under section 9(2) was properly exercised.

8. In support of the above, it would be appropriate to consider decision of this Court (Coram : A L Dave) in Special Civil Application No.294/00 on 19.4.2000. There also the learned Judge of this Court has observed that power of privilege under section 9(2) is required to be properly exercised. Here the said power was not properly exercised and names of the witnesses were not disclosed. Therefore, the petitioner was deprived of the constitutional right guaranteed under Article 22(5) of the Constitution of India for making effective representation against the detenu. In that view of the matter, further continuance of the detenu cannot be sustained in the eye of law.

9. So on the one hand, the petitioner's detention on the strength of registration of a solitary offence, cannot be upheld. On the other hand, non-disclosure of names of witnesses whose statements have been considered by the detaining authority is fatal to the detention order. Therefore, on both the consideration, the order of detention is illegal and hence it is required to be quashed and set aside.

10. For the foregoing reasons, this petition is allowed. The impugned order dated 07.11.2003 passed by respondent No.2 is ordered to be quashed and set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp